80-2214

Office-Supreme Court, U.S.
FILED
JUN 22 1981
ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

HERBERT R. BLACK, THOMAS M. DANIELS, JR. AND J. C. CLEMENTS,

Petitioners,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI

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(A) Questions presented for review.

Whether or not the District Court abused its discretion in restricting testimony from witnesses as to the intent of the parties to the contract, and excluding all testimony dealing with damage features, and in granting Directed Verdict against Petitioners on the main case.

Whether or not the District Court committed error in overruling a Motion for Directed Verdict on behalf of Petitioners against the

Counterclaim of Respondent.

Whether or not the District Court committed error in granting a Motion for Directed Verdict of Respondent against Petitioners on the Counterclaim of Respondent.

(B) Parties.

The caption contains the names of all parties.

(C) Table of Contents.

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(D) Opinion.

The Opinion of the District Court for the Southern District of Georgia was not reported. The Opinion of the Court of Appeals for the Fifth Circuit is reported at 640 F. 2d 699, (1981).

(E) Jurisdiction.

The Judgment of the Court of Appeals for the Fifth Circuit was made and entered on March 26, 1981, and copies thereof are appended to this Petition in the Appendix. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

(F) Statues and Federal Rules Involved.

Federal Rules of Evidence 901(a).

(G) Statement.

Petitioners sued Respondent alleging that Hamilton Mortgage Corporation failed to honor a final draw request under a Acquisition and Development Loan Agreement pertaining to development of raw land in Chatham County, Georgia; that as a result of the breach of the contractual agreement and understanding, certain damages were sustained.

Respondent, in its corporate capacity, had acquired from itself as Receiver of Hamilton National Bank the Promissory Note, Deed to Secure Debt and Acquisition and Development Loan Agreement. It was contended by Petitioners that all documents comprised one asset, that Respondent was a successor in interest and bound by all terms including the obligation to fund the development.

Damages sought were in excess of $400,000.00 and Respondent, prior to filing its Answer, instituted foreclosure proceedings on the Deed to Secure Debt over the property. In addition, Respondent filed an Answer and Counterclaim denying affirmative relief and seeking the amount allegedly owed on the Promissory Note together with attorney's fees and all costs of collection.

The District Court held that 12 U.S.C. 1823(e) under the facts did not afford protection to Respondent and that Respondent's position to the effect that any noncompliance by Hamilton Mortgage Corporation was triggered by Petitioners noncompliance with the terms of the Loan

Agreement, was a factual issue to be resolved by a jury.

During the jury proceeding, the District Court Judge restricted evidence and excluded testimony and evidence dealing with custom and usage in the mortgage lending trade which was material and relevant to the question of breach.

Respondent's Motion for Directed Verdict was granted and Respondent presented evidence on its Counterclaim which consisted of a document which was not authenticated and testified to with no supporting fact. Such evidence was objected to, was allowed by the District Court, was disputed by testimony from one of the Petitioners as to the correctness of the amount alleged, and the District Court entered Judgment on a Motion for Directed Verdict against Petitioners and in favor of Respondent on Respondent's Counterclaim. This was over the objection of Petitioners on the grounds of the inadmissible hearsay evidence and on the further ground that such should have been submitted for a jury determination, even if such evidence was admissible. (T. 233)

Judgment was entered in favor of Respondent against Petitioners jointly and severally for $118,370.64 as principal, $7,679.50 as interest to that date, plus interest at 16 percent per annum and attorney's fees of $12,605.01, with interest on the attorney's fees of seven percent from date. (R. 266)

Notice of Appeal was filed on March 14, 1980. (R. 269)

On Appeal, the Court of Appeals for the Fifth Circuit, Unit B, affirmed. The Fifth Circuit dealt with only the obligation of the Promissory Note as opposed to all aspects of the "asset" held by Respondent, and gave Respondent statutory protection under 12 U.S.C.A. 1823(e), dealt only briefly with the obligation of Respondent to comply with Federal Rules of Evidence 901(a). Custom and usage in the mortgage lending trade was not discussed in the affirming Opinion.

(H) Existence of Jurisdiction Below.

The District Court for the Southern District of Georgia, Savannah Division, had jurisdiction

over this claim and three others which remain pending under 12 U.S.C., Section 1819.

(I) Argument.

This Court should review the decision of the District Court and of the Court of Appeals for the Fifth Circuit which has decided an important question of federal law dealing with requirements under Federal Rules of Evidence 901(a).

Respondent at the trial level introduced its Exhibit 19 (T. 219) which was a document prepared by an unknown person. Respondent's witness testified he could not testify as to the accuracy or correctness of the beginning figures contained on said Exhibit when he first observed them in 1976, a time when Respondent in its Receivership capacity took over The Hamilton National Bank. Petitioners had contracted with The Hamilton Mortgage Corporation, had never had any dealings with the bank, and up until 1976, it had payments paid on the Promissory Note credited to principal with interest accruing. From 1976 until the time of the suit, payments made to Respondent were

applied in a different manner, and there had been a dispute as to the amount owed, if any, throughout. Petitioners had taken the position that due to a breach of contract, there was no amount owed, but in fact was an overpayment.

While Rule 803(6) and (8), Federal Rules of Evidence, provide for the admission of documents of this type, they must be properly authenticated pursuant to Federal Rules of Evidence 901.

No authentication as required was provided and with the failure of the beginning figure on the document to be authenticated, anything else after the beginning figure must clearly fail and clearly was hearsay which should have been inadmissible.

Even if the document was admissible as evidence, the probative value of same should have been left to the jury for decision on a factual basis as opposed to being decided on a motion against Petitioners and by Respondent for Directed Verdict in its favor on this evidence.

It should be pointed out that Petitioners disputed the amount which thereby created a jury issue.

Petitioners do not question the right of the Trial Judge to enter a Directed Verdict in a proper case, but a classic jury question was presented with the type evidence relied upon by Respondent. In affirming that decision, the Court of Appeals is in conflict with the right to have trial by jury on a factual dispute, and such is of enormous far reaching consequences and would cause cases of genuine factual disputes to be removed from jury consideration without proper compliance with the Federal Rules of Evidence.

This Court should review on Writ of Certiorari the decision of the Fifth Circuit in clothing Respondent with the protection of 12 U.S.C. 1823(e) in that such protection was not afforded under the facts of the case and was so stated in the Trial Judge's Order on Partial Summary Judgment. A review should also be made by this Court where an important question dealing with the custom and usage in the mortgage

lending industry, especially in development loans, could have far reaching impact. The Fifth Circuit did not specifically touch on said failure to allow such testimony of intent and it should be clarified in view of the decision in Coastland Corporation v. Third National Mortgage Company, 611 F.2d 969, 4th Circuit (1979). In that case, a developer brought suit against a lender and others alleging that the lender breached an oral commitment to provide construction financing for construction of a condominium project. The Court stated:

> "The whole question is one of intention. If the parties are fully agreed, there is a binding contract, notwithstanding the fact that a formal contract is to be prepared and signed; but the parties must be fully agreed and must intend the agreement to be binding. If though fully agreed on the terms of their contract, they do not intend to be bound until a formal contract

is prepared, there is no contract, and the circumstance that the parties do intend a formal contract to be drawn up is strong evidence to show they did not intend the previous negotiation to amount to an agreement."

In this case on which review is sought, there was an agreement in writing setting forth the intention of the parties and testimony concerning that intention and testimony concerning the custom in the trade should be admissible absent any cloak of protection under 12 U.S.C. 1823(e). The very obligation sought to be enforced by Petitioners was set forth in the documents which Respondent purchased for value. Respondent was paid substantial sums after obtaining the assets in 1976, and never sought to declare Petitioners in default of their obligation under the Note provision of the asset until Petitioners brought suit in the United States District Court.

Far reaching questions which affect the

rights of construction and home building industries are presented by this case, and they will recur and are serious questions which make this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

(J) Appendix.

1. Opinion of the United States Court of Appeals, Fifth Circuit, is attached.

2. Requirement of Authentication or Identification:

(a) General provision. -- The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. -- By way of illustrations only, and not by way of limitation,

the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. -- Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting. -- Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness. -- Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like. -- Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. -- Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon

hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. -- Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. -- Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. -- Evidence that a document or data compilation, in any form, (A) is in such

condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or system. -- Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule. -- Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

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CERTIFICATE OF SERVICE

The undersigned attorney for Petitioners hereby certifies that he has served three copies of Petition for Certiorari on counsel for Respondent, Federal Deposit Insurance Corporation, Leamon R. Holliday, III, Esquire, Bouhan, Williams & Levy, Post Office Box 2139, Savannah, Georgia 31398, by placing copies in the United States Mail, postage prepaid, this 19th day of June, 1981.

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"Herbert R. BLACK, Thomas M. Daniels, Jr. and J. C. Clements,

Plaintiffs-Appellants,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Defendant-Appellee.

No. 80-7196

United States Court of Appeals,
Fifth Circuit.
Unit B

March 26, 1981.

A promissory note was sold by the Federal Deposit Insurance Corporation as receiver to the FDIC in its corporate capacity. Obligors sued the FDIC alleging breach of agreements allegedly made with the lender, and the FDIC counterclaimed for principal and interest due on the note. The United States District Court for the Southern District of Georgia, B. Avant Edenfield, J., directed verdict against obligors on their claims and directed verdict for FDIC on its counterclaim for principal and interest. Obligors appealed. The Court of Appeals, Tuttle, Circuit Judge, held that:

(1) where, although under terms of agreement lender could continue to make advances without waiving its right to demand payment or to withhold further advances because of borrower's default, agreement provided that lender would be under no obligation to make any advance if borrower breached or failed to perform any covenant or condition, there was no breach by lender in not making further advancements at time when payments of principal by obligors had not been timely made, and (2) in any event statutory protection of FDIC shielded it from assertion of alleged oral side agreements asserted against insolvent bank.

Affirmed.

1. Contracts 315

Where, although under terms of agreement lender could continue to make advances without waiving its right to demand payment or to withhold further advances because of borrower's default, agreement provided that lender would be under no obligation to make any advance if borrower breached or failed to perform any

covenant or condition, there was no breach by lender in not making further advancements at time when payments of principal by obligors had not been timely made.

2. Contracts 177

Papers which dealt with acquisition and development financing and gave mortgage company right of first refusal on all construction financing generated by development bound only obligors and there was no breach on part of lenders in failing to extend construction financing.

3. Banks and Banking 505

Statutory protection of Federal Deposit Insurance Corporation shielded it from assertion of alleged oral side agreements asserted against insolvent bank. Federal Deposit Insurance Act, §2(13)(e), 12 U.S.C.A. §1823(e); Fed. Rules Evid. Rule 901, 28 U.S.C.A.

4. Evidence 376(1)

In suit by Federal Deposit Insurance Corporation on note acquired by it as receiver of insolvent bank, where FDIC employee

testified that beginning figure of balance due was taken from bank's books by another FDIC employee, it was sufficiently clear from testimony of FDIC employee that "matter in question is what its proponent claims" within purview of Federal Rules of Evidence. Fed. Rules Evid. Rule 901(a), 28 U.S.C.A.

5. Banks and Banking 508

Where obligor disputed amount shown due by records of Federal Deposit Insurance Corporation but his dispute was never quantified and his belief was not supported with either fact or law, verdict was properly directed as to amount owed.

Appeal from the United States District Court for the Southern District of Georgia.

Before TUTTLE, RONEY and VANCE, Circuit Judges.

TUTTLE, Circuit Judge:

Black, Daniels, and Clements are three obligors who, on February 4, 1974, signed a note payable to Hamilton Mortgage Corporation

for $458,000. This note was transferred to Hamilton National Bank and, upon that institution's insolvency, the Federal Deposit Insurance Corporation (FDIC) acquired it as a receiver of the bank. FDIC as receiver then sold the note to FDIC in its corporate capacity.

The purpose of this financing was to assist in the obligors' development of real estate. Under the "Acquisition and Development Loan Agreement" the lender was obligated to "make loans and advances to Borrower for the acquisition and development" of certain real estate. The sum of the advances was limited to $458,000.00. The obligor had the right to draw specified sums for such purposes. When at most $14,892.00 remained to be drawn from Hamilton Mortgage in October, 1975, the obligor requested a final draw of $23,455.82. Payments of principal by obligors due before the making of the final draw request were admittedly not made on time. Hamilton Mortgage never issued the final draw. Subsequently, the obligors

requested "construction financing" for its now-developed real estate. They believed they were entitled to these loans under the "Acquisition and Development Loan Agreement." Neither Hamilton Mortgage nor FDIC ever granted their request.

The obligors sued FDIC alleging breach of the agreements made with Hamilton Mortgage. They sought affirmative damages against FDIC, cancellation of the principal indebtedness still owed, and cancellation of the deed that pledged the real estate for the payments of the note. FDIC counterclaimed for the principal and interest due on the note. On defendant's motion for summary judgment, the district court disallowed all of plaintiffs' claims for affirmative damages. After hearing evidence on whether Hamilton Mortgage of FDIC had breached any of their respective obligations, the court directed a verdict against obligors who thereby lost any right to set off against the amount owed FDIC. Subsequently, the court directed a verdict for FDIC on its

counterclaim for principal and interest due. The plaintiffs-obligors appeal the district court's rulings.

[1,2] The first question we reach is whether the district court correctly concluded that there was no evidence before that court showing a breach of contract by either Hamilton Mortgage or FDIC. We believe that the district court correctly directed verdict on this issue. Obligors argue that Hamilton Mortgage and FDIC failed fully to fund development financing and later failed to fund construction financing (for the construction of individual housing units). First, the argument based on development funding must fail. All three obligors testified that the interim payments were not paid by Black, Daniels, and Clements as due under the note. The Acquisition and Development Loan Agreement provided that the "Lender shall be under no obligation to make any advance if ... Borrower breaches or fails to perform, observe or meet any covenant or condition herein made, or made in any instrument executed pursuant hereto."

But the lender could continue to make advances without waiving its right to demand payment or withhold further advances. Hamilton Mortgage, and later FDIC, therefore could not have breached by failing to advance additional funds for development. Even if the loan was not fully funded in this respect, the express terms of the contract hold that the obligors, once breaching by late payment, no longer had a contractual right to further advances for development. Second, the construction funding argument must fail. None of the papers constituting the agreement committed Hamilton Mortgage to make construction financing to these obligors. Rather these papers dealing with acquisition and development financing merely gave Hamilton Mortgage the "right of first refusal on all construction financing generated by this development." The obligors label this language as "commendatory," but plainly it only binds the obligors to give this right to Hamilton Mortgage who may nevertheless refuse it. Therefore, under the

written contract there was no breach because of failure to extend construction financing. The district court properly directed a verdict against the obligors because there was no evidence of any breach by FDIC or Hamilton Mortgage.[1]

[3] Plaintiffs-obligors also attempted to engraft additional unwritten understandings onto the agreement. Specifically, they sought to alter the terms of agreement by testimony, excluded by the district court, regarding the subjective intent of Hamilton Mortgage and the custom of the lending trade. The purpose of this testimony was to establish that the agreement included an obligation of Hamilton Mortgage to make construction financing and that Hamilton Mortgage considered the prior tardiness of the obligors to be immaterial. Regardless of whether the parol evidence rule would make these alterations of the agreement irrelevant, the FDIC's statutory protection clearly shields it from the assertion of these oral side agreements.

> No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing; (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank; (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.

12 U.S.C.A. §1823(e) (West 1980). These agreements urged upon us by the obligors clearly go beyond the mere explanation of the

written agreement. Language used by the Court of Appeals for the Fourth Circuit in response to similar claimed oral understandings is appropriate in this case.

> A plain reading of the statute reflects that a transparent attempt to avoid an obligation, such as was present in this case, is exactly the type of transaction proscribed by the Act.

FDIC v. Waldron, 630 F.2d 239, 241 (4th Cir. 1980).

[4,5] Obligors further question whether FDIC sufficiently proved the amount due under the note. They first claim that FDIC did not offer proper authentication under rule 901 for the beginning figure in FDIC's ledger regarding this account. An FDIC employee testified that the beginning figure of the balance due was taken from the bank's books by another FDIC employee. We believe it was sufficiently clear from the testimony of the FDIC employee that the "matter in question is what its proponent claims." Fed.R.Evid. 901(a). The

obligors next argue that there was a fact question regarding the amount due because obligor-Black disputed the amount shown due by FDIC's records. But Black's dispute was never quantified. Moreover, his sole dispute with FDIC's figures turns on his belief that no interest was due on the principal outstanding after February 1976. The obligors do not support Black's belief with either fact or law. The district court's directed verdict on the amount owed was proper.

In all respects the judgment of the district court is AFFIRMED.

1. Our holding that there was no breach makes it unnecessary to consider the obligors' appeal of the district court's prior summary judgment ruling which held that the obligors could not sue FDIC for damages but could bring a recoupment action against FDIC, in its corporate capacity, to void the note. This holding was premised upon the court's belief that an action for recoupment is made against FDIC as receiver of the bank. Compare Riverside Park Realty Co. v FDIC, 465 F. Supp. 305, 313 & n. 7 (M.D. Tenn. 1978) (action may be made against FDIC in corporate capacity for breach of contract by FDIC's assignors when FDIC would try to recover on the very same agreement) with FDIC v. James T. Barry Co., 453 F.Supp. 81, 82-83 (E.D.Wis. 1978) (in action on note held by FDIC in corporate capacity, recovery or recission against FDIC on counterclaims based on actions of FDIC's assignors dismissed) and FDIC v. Smith, 466 F. Supp. 843, 845

(N.D.Ga. 1979) (semble). Similarly, we need not decide whether plaintiff has sued the FDIC as receiver as well as suing it in its corporate capacity. See generally FDIC v. Design & Development, Inc., 73 F.R.D. 442, 443-44 (E.D.Wis. 1977); Freeling v. Sebring, 296 F.2d 244 (10th Cir. 1961)."